

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

STERLING SAVINGS BANK,

Plaintiff,

v.

AIR WISCONSIN AIRLINES  
CORPORATION

Defendant.

No. CV-05-071-FVS

ORDER

AIR WISCONSIN AIRLINES  
CORPORATION

Third Party Plaintiff,

UNITED ENERGY, INC.

Third Party Defendant.

**THIS MATTER** came before the Court for resolution of a discovery dispute. Sterling Savings Bank is represented by Leslie R. Weatherhead. Air Wisconsin Airlines Corporation is represented by William D. Hyslop. United Energy, Inc., is represented by Louis B. Byrd, Jr.

**BACKGROUND**

Sterling Savings Bank filed suit against Air Wisconsin Airlines Corporation in state court. Air Wisconsin removed the action to federal court and filed a third-party complaint against United Energy, Inc. The latter moved to dismiss on the ground it is not

1 subject to personal jurisdiction in this forum. Fed.R.Civ.P.  
2 12(b)(2). Air Wisconsin asked to conduct discovery with respect to  
3 the existence of personal jurisdiction; a request the Court granted.  
4 As a result, Air Wisconsin served United Energy with 24 requests for  
5 production. United Energy objected to virtually all of them. When  
6 the parties were unable to resolve the dispute, Air Wisconsin filed a  
7 motion to compel United Energy to answer its requests and to pay  
8 sanctions for failing to do so. In response, United Energy filed a  
9 motion for a protective order.

#### 10 **RULE 26**

11 "Parties may obtain discovery regarding any matter, not  
12 privileged, that is relevant to the claim . . . of any party[.]"  
13 Fed.R.Civ.P. 26(b)(1). Information is relevant if it is "'reasonably  
14 calculated to lead to the discovery of admissible evidence.'" *Survivor Media, Inc. v. Survivor Productions*, 406 F.3d 625, 635 (9th  
15 Cir.2005) (quoting Rule 26(b)(1)). Given this standard, the Court  
16 cannot determine whether information is relevant without considering  
17 the issue being litigated. Here, the issue is personal jurisdiction,  
18 which may be either general or specific. See *Amoco Egypt Oil Co. v.*  
19 *Leonis Navigation Co., Inc.*, 1 F.3d 848, 850-51 (9th Cir.1993). Of  
20 the two, Air Wisconsin seems to be more intent upon establishing the  
21 existence of general jurisdiction.<sup>1</sup>

22 A nonresident corporation is subject to general jurisdiction in

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23 <sup>1</sup>State law governs whether the defendants are subject to  
24 personal jurisdiction in the State of Washington. See *Cubbage v.*  
25 *Merchant*, 744 F.2d 665, 667 (9th Cir.1984), cert. denied, 470  
26 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985). Federal law  
governs whether exercising personal jurisdiction would violate  
the defendants' right to due process. *Id.* See also 4A Charles  
Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §  
1075, at 411-12 (3d ed.2002) ("Federal law always is controlling  
to determine whether the constitutional principles of due process  
. . . have been satisfied.").

1 the State of Washington if it was doing business in this state at the  
2 time the cause of action accrued. RCW 4.28.080(10).<sup>2</sup> *Im Ex Trading*  
3 *Co. v. Raad*, 92 Wn. App. 529, 537, 963 P.2d 952 (1998), review  
4 *denied*, 137 Wn.2d 1023, 980 P.2d 1280 (1999). A corporation is doing  
5 business in this state when its activities in Washington are  
6 "substantial and continuous." *Raymond v. Robinson*, 104 Wn. App. 627,  
7 633, 15 P.3d 697 (2001). This test is consistent with the  
8 requirements of due process. *Cf. Easter v. American West Financial*,  
9 381 F.3d 948, 960 (9th Cir.2004) ("A defendant is subject to general  
10 jurisdiction only where the defendant's contacts with a forum are  
11 substantial or continuous and systematic."); *Bancroft & Masters, Inc.*  
12 *v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir.2000) ("A  
13 defendant whose contacts with a state are 'substantial' or  
14 'continuous and systematic' can be haled into court in that state in  
15 any action, even if the action is unrelated to those contacts."  
16 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S.  
17 408, 415, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984))). Indeed,  
18 Washington courts apply the "doing business" test in order to make  
19 certain that due process concerns are addressed before a nonresident  
20 defendant is subjected to general jurisdiction in Washington. *Im Ex*  
21 *Trading Co.*, 92 Wn. App. at 537. Since "the 'doing business' and due  
22 process inquiries are the same," *Amoco Egypt Oil Co.*, 1 F.3d at 851  
(citations omitted), the "statutory and constitutional standards  
merge into a single due process test." *Id.* (internal punctuation and

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23 <sup>2</sup>RCW 4.28.080(10) provides that, in the case of suit against  
24 "a foreign corporation or nonresident joint stock company,  
25 partnership or association doing business within this state," the  
26 summons may be served upon "any agent, cashier or secretary  
thereof." Washington appellate courts have held that this  
statute creates general jurisdiction. See, e.g., *Hein v. Taco*  
*Bell, Inc.*, 60 Wash. App. 325, 328-29, 803 P.2d 329 (1991)  
(citation omitted).

1 citations omitted).

2 In this context, then, information is relevant if it either  
3 reveals the nature and scope of United Energy's activities in  
4 Washington or is reasonably calculated to uncover such information.  
5 Of course, not all relevant information is subject to discovery.  
6 Upon a showing of good cause, a court may enter an order relieving a  
7 party of its obligation to respond to a particular discovery request;  
8 for example, where disclosure would be unduly burdensome or  
9 expensive. Fed.R.Civ.P. 26(c). However, "[t]he burden is upon the  
10 party seeking the order to show 'good cause' by demonstrating harm or  
11 prejudice that will result from discovery." *Rivera v. NIBCO*, 364  
12 F.3d 1057, 1063 (9<sup>th</sup> Cir.2004).

#### 13 **AIR WISCONSIN IS ACTING IN GOOD FAITH**

14 United Energy argues that Air Wisconsin has conceded in an email  
15 that its claim(s) should be litigated in Oregon.<sup>3</sup> This argument is  
16 unpersuasive. While, as United Energy points out, the author of the  
17 email suggested filing suit in the District of Oregon, the author's  
18 suggestion does not come anywhere close to constituting a concession  
19 on the part of Air Wisconsin that its claim(s) against United Energy  
20 must be litigated in Oregon.

#### 21 **DISCOVERY MAY ENABLE AIR WISCONSIN TO ESTABLISH PERSONAL 22 JURISDICTION**

23 United Energy seems to assume general jurisdiction cannot exist  
24 unless Air Wisconsin's claim arises out of United Energy's activities  
25 in this state. Since, in United Energy's opinion, Air Wisconsin has  
26 all but conceded its claim does not arise out of forum-related  
activities, United Energy argues Air Wisconsin cannot establish  
general jurisdiction no matter how much discovery it conducts. This

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<sup>3</sup>The email is attached to a memorandum entitled "Third Party Defendant's Memorandum in Support of FRCP 26(c) Motion for an Order of Protection."

1 argument is unpersuasive. Contrary to United Energy, general  
2 jurisdiction may arise even though Air Wisconsin's claim is unrelated  
3 to United Energy's activities in Washington. *See Helicopteros*  
4 *Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-55, 104 S.Ct.  
5 1868, 1872, 80 L.Ed.2d 404 (1984). As explained above, general  
6 jurisdiction will exist if Air Wisconsin can demonstrate that United  
7 Energy's activities in this state were substantial and continuous.  
8 Whether Air Wisconsin can satisfy this standard remains to be seen.  
9 However, discovery may enable Air Wisconsin to make the requisite  
10 showing.

11 **A FIVE-YEAR TIME SPAN IS NOT UNREASONABLE**

12 Air Wisconsin is seeking information concerning United Energy's  
13 activities in Washington from January 1, 2000, until the present.  
14 United Energy argues discovery should be limited to those business  
15 activities that occurred during 2004, the year in which it sold fuel  
16 to Air Wisconsin. This argument is unpersuasive. Whether United  
17 Energy's activities in Washington are "substantial and continuous"  
18 cannot be determined accurately unless the Court looks at the full  
19 range of United Energy's activities in this state. Arbitrarily  
20 limiting the inquiry to a single year would frustrate the Court's  
21 ability to make an accurate determination. Nor is there any  
22 authority for United Energy's argument that the inquiry be limited in  
23 scope. To the contrary, in deciding whether general jurisdiction  
24 exists, courts typically look at events stretching over a period of  
25 years. *See, e.g., Gates Learjet Corp. v. Jensen*, 743 F.2d 1325,  
26 1328-31 (9<sup>th</sup> Cir.1984) (business relationship extended from 1978  
until 1981; court looked at all contacts occurring that period).

27 **AIR WISCONSIN MAY DISCOVER INFORMATION CONCERNING UNITED**  
28 **ENERGY'S RELATIONSHIPS WITH ITS SUBSIDIARIES**

29 If United Energy and its subsidiaries are separate entities, Air  
30 Wisconsin may not establish the existence of general jurisdiction

1 over United Energy based upon its subsidiaries' contacts with  
2 Washington. See *Doe v. Unocal Corp.*, 248 F.3d 915, 925-26 (9th  
3 Cir.2001). However, if United Energy and its subsidiaries are not  
4 separate entities, "'the local subsidiary's contacts with the forum  
5 may be imputed to the foreign parent corporation.'" *Id.* at 926  
6 (quoting *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676  
7 (D.C.Cir.1996)). Cf. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell &*  
8 *Clements Ltd.*, 328 F.3d 1122, 1134-35 (9th Cir.2003) (hereinafter  
9 "*Harris Rutsky*") ("a subsidiary's contacts may be imputed to the  
10 parent where the subsidiary is the parent's alter ego, or where the  
11 subsidiary acts as the general agent of the parent").<sup>4</sup> In view of  
12 these principles, Air Wisconsin is entitled to conduct discovery with  
13 respect to the relationships between United Energy and each of its  
14 subsidiaries that does business in this state.

15 **UNITED ENERGY HAS NOT DEMONSTRATED THAT A PROTECTIVE ORDER IS**  
16 **NECESSARY**

17 United Energy complains that Air Wisconsin's requests are unduly  
18 burdensome. United Energy asks the Court to enter a protective order  
19 limiting its discovery obligations in the following respects: that  
20 United Energy not be required to produce public records concerning  
21 state-court litigation between United Wood Products, a subsidiary,  
22 and Kimberly Clark, International; that United Energy not be required  
23 to provide "litigation documents relating to any pending suit against  
24 any of its subsidiaries"; that United Energy not be required to  
25 disclose "irrelevant correspondence between [United Wood Products]  
26 and [Kimberly Clark]"; that United Energy not be required to disclose

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27 <sup>4</sup>Although *Harris Rutsky* involved application of California  
28 law, the Ninth Circuit's discussion of the parent-subsidiary  
29 relationship was rooted in the common law. *Cannon Mfg. Co. v.*  
30 *Cudahy Packing Co.*, 267 U.S. 333, 336-37, 45 S.Ct. 250, 251, 69  
31 L.Ed. 634 (1925). Washington law is in accord. *State v.*  
32 *Northwest Magnesite Co.*, 28 Wn.2d 1, 41, 182 P.2d 643 (1947).

1 "asset documentation that is being requested by [Air Wisconsin] under  
2 the guise of jurisdictional discovery"; and that United Energy not be  
3 required to disclose "documentation that is already in the possession  
4 of [Air Wisconsin] via Initial Disclosure, or that can be obtained  
5 directly from [sic] [Sterling Savings Bank]." As explained above,  
6 United Energy bears the burden of demonstrating good cause for a  
7 protective order. With one possible exception, United Energy has not  
8 done so. Request for Production No. 8 seeks "[c]opies of all  
9 pleadings in all court proceedings in which [United Energy] and/or  
10 one of its subsidiaries or affiliates has been named a party  
11 (plaintiff, defendant, or third-party)." In answering this request,  
12 United Energy need not obtain copies of pleadings from court clerks.  
13 However, United Energy must provide copies of all pleadings that are  
in its possession, or in its attorney's possession, or in the  
possession of an attorney for one of its subsidiaries.

#### 14 **SANCTIONS**

15 Air Wisconsin asks the Court to sanction United Energy for  
16 unreasonably failing to provide discovery. This request is governed  
by Rule 37(a)(4)(A), which provides:

17 If the motion is granted . . . *the court shall, after*  
18 *affording an opportunity to be heard, require the party or*  
19 *deponent whose conduct necessitated the motion or the party*  
20 *or attorney advising such conduct or both of them to pay*  
21 *the moving party the reasonable expenses incurred in making*  
22 *the motion, including attorney's fees, unless the court*  
23 *finds that the motion was filed without the movant's first*  
making a good faith effort to obtain the disclosure or  
discovery without court action, or that the opposing  
party's nondisclosure, response, or objection was  
substantially justified, or that other circumstances make  
an award of expenses unjust.

24 (Emphasis added.) Here, there is no question but that Air Wisconsin  
25 made a good-faith effort to resolve this dispute without court  
26 action. Thus, the issue is whether United Energy's refusal to  
provide discovery was substantially justified. See, e.g., *Freeman v.*

1 *San Diego Association of Realtors*, 322 F.3d 1133, 1156 (9<sup>th</sup>  
2 Cir.2003). Having carefully reviewed the materials submitted by the  
3 parties, the Court finds that United Energy's objections to Air  
4 Wisconsin's requests for production were not substantially justified.  
5 Accordingly, United Energy must reimburse Air Wisconsin for the  
6 reasonable expenses it has incurred as a result of bringing its  
motion to compel.

7 **IT IS HEREBY ORDERED:**

8 1. United Energy's motion for a protective order (**Ct. Rec. 46**)  
9 is denied.

10 2. Air Wisconsin's motion to compel (**Ct. Rec. 39**) is granted.  
11 Within fourteen days of entry of this order, United Energy shall  
12 provide complete answers to all of Air Wisconsin's requests for  
production.

13 3. Air Wisconsin's motion for sanctions (**Ct. Rec. 39**) is  
14 granted. Within fourteen days of entry of this order, Air Wisconsin  
15 shall file and serve a documented application for reasonable  
16 expenses. United Energy may have fourteen days in which to file and  
serve a response.

17 4. Within fourteen days, the parties shall file a joint report  
18 indicating whether they can comply with the deadlines established by  
19 the scheduling order that was entered on June 1, 2005.

20 **IT IS SO ORDERED.** The District Court Executive is hereby  
21 directed to enter this order and furnish copies to counsel.

22 **DATED** this 13th day of October, 2005.

23 s/ Fred Van Sickle  
24 Fred Van Sickle  
United States District Judge